Supreme Court, U.S.
FILED
JUL 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2036.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988.

CITY OF EVERETT, ET AL.,
Petitioners,
v.

ROSE BORDANARO, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

IRA H. ZALEZNIK,*
LEWIN & ROSENTHAL,
The Pilot House,
Lewis Wharf,
Boston, Massachusetts 02110.
(617) 227-9400

**Counsel of Record*

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

Table of Contents.

Argument 1

I. Everett's objection to the jury charge on the causation issue was properly preserved in the District Court 1

II. Bordanaro distorted the evidence in the record of Everett's alleged custom of breaking down doors to effect felony arrests and prior incidents of police misconduct 3

Conclusion 5

Table of Authorities.

Cases.

Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989) 2n, 4, 5

Memphis Community School District v. Stachura, 477 U.S. 299 (1986) 3

Palmer v. Hoffman, 318 U.S. 109, 119 (1943) 3

Rules.

Federal Rule of Civil Procedure 51 3

No. 88-2036.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988.

CITY OF EVERETT, ET AL.,
Petitioners,
v.
ROSE BORDANARO, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

Argument.

I. EVERETT'S OBJECTION TO THE JURY CHARGE ON THE CAUSATION ISSUE WAS PROPERLY PRESERVED IN THE DISTRICT COURT.

In their brief in opposition, Respondents Rose Bordanaro et al., (hereafter to be referred to collectively as "Bordanaro") claimed that Petitioner City of Everett's ("Everett") objection

to the District Court's jury instruction on causation was not preserved for review. This argument is patently false.[1]

At trial, counsel for Everett clearly and distinctly brought the problem with the causation instruction to the attention of the Trial Judge. Prior to the time that the jury retired, at a sidebar conference after the Court's charge, the following exchange took place between counsel for Everett, Mr. Levy, and the Court:

Mr. Levy:	All right. In several instances, although you did mention the word "moving force" once —
The Court:	Yes.
Mr. Levy:	— on numerous occasions, you said "a cause" —
The Court:	Right.
Mr. Levy:	— an affirmative link, a cause.
The Court:	That's right.
Mr. Levy:	I think where "moving force" means it has to be more than just a contributing cause, it has to be the moving force. If there are five causes to some event, perhaps one of them is the moving force, although they are all causes.
The Court:	Well, I gave it once. I don't have to say it again.
Mr. Levy:	It depends upon what you repeat and what you don't repeat as to what a jury is —

[1] Bordanaro raised this argument to the Court of Appeals. See Brief for Bordanaro to the Court of Appeals, pages 39-40. The Court of Appeals evidently thought so little of the argument that the Court ignored it in its opinion, and proceeded directly to the merits of the jury charge. See Appendix to Petition for Certiorari ("App."), pages A28-A29, *Bordanaro* v. *McLeod*, 871 F.2d 1151, 1165-1166 (1st Cir. 1989).

The Court: True.[2]

This exchange at sidebar satisfied all of the elements of Fed. R. Civ. P. 51. First, counsel for Everett specifically directed the attention of the Court to the problem language in the charge. Counsel clearly pointed out to the Court that its use of the terms "a cause" and "an affirmative link" could be taken by the jury to mean that liability could be found if the policy or custom merely contributed to the ultimate harm. This portion of the objection clearly satisfied the "stating distinctly" requirement of Rule 51. See e.g. *Memphis Community School District* v. *Stachura*, 477 U.S. 299, 304-305 n.6 (1986).

Second, counsel succinctly set forth the grounds for the objection. Counsel pointed out to the Court that the concept of "moving force" meant more than simply having a causal connection to the ultimate injury, and that this requirement imposed a more strict standard of causation. This exchange satisfied the purpose of Rule 51 that the Trial Judge be apprised of the objection so that he would have the opportunity to correct the erroneous instruction. See e.g. *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943).

In short, Bordanaro's claim that Everett did not preserve its objection to the causation instruction is specious. As is clear from the record, Everett lodged a sufficient objection to the instruction to preserve the issue for consideration by this Court.

II. Bordanaro Distorted the Evidence in the Record of Everett's Alleged Custom of Breaking Down Doors to Effect Felony Arrests and Prior Incidents of Police Misconduct.

In two critical areas in the brief in opposition, Bordanaro's hyperbole went well beyond the factual evidence contained in

[2] See Trial Transcript, Volume 16, pages 37-38.

the record in this matter. The effect of these distortions, left uncorrected, could be to mislead this Court as to the basis for the Court of Appeals' decision.

First, Bordanaro suggested that there was some evidence in the record in police reports sent to the Chief for his review of Everett's alleged unconstitutional "custom" of breaking down doors to effect felony arrests. See brief in opposition, page 9. To the contrary, there were no such reports introduced into evidence. Instead, the Court of Appeals held that the custom existed based solely upon the testimony of Sgt. Ferullo and the inferences that could be drawn from the King Arthur incident itself. See App. A9-A10, *Bordanaro*, *supra*, 871 F.2d at 1156-1157.

As a result, the Court of Appeals fashioned Everett's liability based upon the "custom" utilizing a set of assumptions. The Court *assumed* that the practice of breaking down doors to effect felony arrests continued notwithstanding an intervening change in state law; it *assumed* that details of such forced entries were written down in police reports; and it *assumed* that such reports were actually forwarded to the Chief for his review. Liability based upon such assumptions is vicarious, at best.

Second, Bordanaro asserted that the testimony of Sgt. Ferullo and the expert on police practices provided evidence "that the Everett Police so often violated constitutional rights" that the need for additional training was obvious. See brief in opposition, page 14. The suggestion that there was any evidence of other constitutional violations was false. Instead, as the Court of Appeals acknowledged, Bordanaro failed to introduce any other instance of police misconduct prior to the King Arthur incident itself. See App. A16-A19, *Bordanaro*, *supra*, 871 F.2d at 1159-1161. Liability in this case was based solely upon "direct evidence" of police inadequacies, along with inferences drawn from the incident itself. See App. A10, A19,

Bordanaro, supra, 871 F.2d at 1156-1157, 1161. The Court of Appeals' analysis in this area, too, created a form of vicarious liability for Everett.

Notwithstanding the suggestions of Bordanaro, the record in this case contained no evidence of other incidents of police misconduct. Questions two and three in the petition therefore accurately set forth the issues of causation and fault in a case, such as this one, where there were no prior violations to warn officials of the problem.

Conclusion.

For all of the foregoing reasons, Petitioners City of Everett, et al., maintain that the issues in this case have been properly preserved for review as set forth in their petition. Accordingly, petitioners respectfully request this Court to grant the relief requested in their petition.

Respectfully submitted,

IRA H. ZALEZNIK,*
LEWIN & ROSENTHAL,
The Pilot House,
Lewis Wharf,
Boston, Massachusetts 02110.
(617) 227-9400

**Counsel of Record*